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**CONFIDENTIAL MEMORANDUM
ATTORNEY-CLIENT PRIVILEGED COMMUNICATION**

TO: Honorable Board of Supervisors
Jeffrey V. Smith, County Executive
Gary A. Graves, Chief Operating Officer

FROM: Miguel Márquez, County Counsel *Miguel Márquez*
Orry P. Korb, Assistant County Counsel *OK*
Susan Swain, Lead Deputy County Counsel *SS*
Steve Mitra, Deputy County Counsel

RE: Disclosing the Contents of a Draft RFP to a County Supervisor or His/Her Aide

DATE: April 5, 2012

Draft Requests for Proposals (RFPs) are occasionally shared with members of the Board of Supervisors or their aides, or Board offices may receive briefings on the content of certain RFPs, before they are released for bidding. The Board of Supervisors has asked for advice on a mechanism to accommodate this flow of information.

If an individual Board office wishes to review a draft RFP or be briefed on the contents of an RFP, the Board office should retain the draft in confidence and avoid sharing it with anyone outside of the Board office or the County in order to avoid an appearance of impropriety arising from the potential of selectively releasing the draft to certain vendors.¹ These vendors may be perceived to enjoy an unfair advantage over others when the RFP is eventually released and the County could be seen as compromising its commitment to a competitive process.²

In order to alleviate this concern, we recommend that any Board member or Board aide

¹ RFPs are sometimes discussed in open session. It is preferable for such disclosures to occur in a properly agendaized Board meeting or Board Committee meeting. At such forums, the draft RFP would be made public and available to any interested third parties – such as potential bidders – so that there would be no question or appearance of favoritism to any particular bidder. Additionally, the discussion at such meetings would be attributable to the entire Board or Policy Committee, rather than any individual Board member.

² This commitment is expressed in Board Policy 5.6.2, which states: “It is the policy of the Board that the County conduct an open, fair and full competitive solicitation process for the procurement of goods and/or services ...” A process that favors some vendors over others cannot be described as “open” or “fair” or even “competitive.”

receiving a copy of, or discussing the contents of, a confidential draft RFP, be reminded of the concomitant restrictions by way of signing an acknowledgment, which would read as follows:

I understand, acknowledge and agree that under the Board's commitment to an open and fair competitive solicitation, as expressed in Board Policy 5.6.2, I am required to comply with the following:

- 1) I understand that I am being provided this draft in order to allow me to provide feedback on the solicitation process. I will not use this document for any other purposes.
- 2) I understand and agree that the draft document I am about to receive is to be treated as confidential and its contents may not be disclosed to any other person, whether employed by the County or not.
- 3) I shall keep and maintain the draft document in a safe and secure place with adequate safeguards to insure that unauthorized persons do not have access to it.

Name:

Title:

A copy of the signed acknowledgment would be kept by the County staff member disclosing the draft RFP to address any future issues that are raised.

The above language would address the concerns associated with the appearance of selective disclosure. However, as also suggested, there are other concerns with sharing a draft RFP with a single member of the Board. To the extent that a Board member's views are sought on a draft, such views may not be reflective of the views of the Board as a whole, and, as such, could not be imputed to the Board. Additionally, if a draft is discussed among a majority of either the Board or one of its Policy Committees, the potential for a serial meeting violating the Brown Act also exists. A violation would occur if concurrence is reached through those meetings. Caution should be exercised to these concerns. County Counsel can provide assistance to ensure compliance with these rules.